

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

OSVALDO RIVERA RODRIGUEZ,

Petitioner,

v.

**CIVIL ACTION NO. 5:20-CV-128
Judge Bailey**

ROBERT HUDGINS, Warden,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

The above-styled matter came before this Court for consideration of the Report and Recommendation of United States Magistrate Judge Mazzone [Doc. 9]. Pursuant to this Court's Local Rules, this action was referred to Magistrate Judge Mazzone for submission of a proposed report and a recommendation ("R&R"). Magistrate Judge Mazzone filed his R&R on March 5, 2021, wherein he recommends the § 2241 petition be denied and dismissed. For the reasons that follow, this Court will adopt the R&R.

I. BACKGROUND

On June 30, 2020, Osvaldo Rivera Rodriguez ("petitioner"), a federal inmate incarcerated at FCI Gilmer, filed a *pro se* Petition for Habeas Corpus pursuant to 28 U.S.C. § 2241. See [Doc. 1]. Petitioner contends that the Bureau of Prisons ("BOP") has incorrectly calculated his custody level classification. [Id.]. More specifically, petitioner alleges that when he arrived at FCI Gilmer, his Custody Level was +27. [Id.]. After meeting with his Unit Team, the petitioner alleges that his +27 Custody Level with a +2 variance was reevaluated. [Id.].

However, he maintains that once the Unit Team reevaluated, the +2 variance was removed but other variances were not awarded, which resulted in an improper +25 Custody Level designation. [Id.]. Petitioner seeks to correct this purportedly erroneous Custody Level classification through § 2241. [Id.].

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Nor is this Court required to conduct a *de novo* review when the party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); *Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). *Pro se* filings must be liberally construed and held to a less stringent standard than those drafted by licensed attorneys, however, courts are not required to create objections where none exist. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1971).

Here, objections to Magistrate Judge Mazzone's R&R were due within fourteen (14) days of receipt of the R&R, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. Petitioner timely filed his Objections [Doc. 14] on April 13, 2021. Accordingly, this Court will review the portions of the R&R to which objections were filed *de novo*, and the remainder of the R&R will be reviewed for clear error.

III. DISCUSSION

§ 2241 provides a remedy where a prisoner "is in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(3). In a § 2241 petition, a prisoner may seek relief from his parole, computation of his sentence, or disciplinary actions taken against him. "[T]he Supreme Court [has] held that the writ of habeas corpus was the exclusive civil remedy for prisoners seeking release from custody." *Glaus v. Anderson*, 408 F.3d 382, 386 (7th Cir. 2005). At the "heart of habeas corpus" petitions, petitioners challenge "the fact or duration of [their] physical confinement," or "[seek] immediate release or a speedier release from active confinement." See *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973).

In the R&R, Magistrate Judge Mazzone found that petitioner alleges no facts to demonstrate that BOP's custody classification has affected the fact or duration of his confinement. [Doc. 9 at 3]. Petitioner objected to the R&R, stating that he is entitled to relief under § 2241 based on the computation of his sentence. [Doc. 14 at 1–2]. However, petitioner's objections center on the computation of his Custody Level classification rather than the execution of sentence. [Id. at 2].

As indicated by Magistrate Judge Mazzone, challenges to a federal prisoner's custody classification, like the challenges brought here, are not cognizable under § 2241. See *Levi v. Ebbert*, 353 F.App'x 681, 682 (3d Cir. 2009) ("Claims concerning the determination of [a prisoner's] custody level do not lie at the 'core of habeas' and, therefore, are not cognizable in a § 2241 petition"). Numerous district courts within the Fourth Circuit have noted or applied this principle. *Sappleton v. Hogsten*, 2014 WL 2565547, at *1 (S.D. W.Va. June 6, 2014) (construing § 2241 petition challenging custody classification as a complaint pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and dismissing it for failure to state a claim); *Rodriguez v. Cruz*, 2013 WL 2416321, at *4 (D. S.C. June 3, 2013) (reasoning that a § 2241 habeas petition is not the proper avenue for challenging a prisoner's security or custody classification); *Moore v. Driver*, 2008 WL 4661478, at *8 (N.D. W.Va. Oct. 21, 2008) (Keeley, J.) (same).

IV. CONCLUSION

For the aforementioned reasons, petitioner's Objections [Doc. 14] are OVERRULED, and it is the opinion of this Court that the Report and Recommendation [Doc. 9] should be, and is, hereby ORDERED ADOPTED for the reasons more fully stated in the magistrate judge's report. Accordingly, this Court ORDERS that the § 2241 petition [Doc. 1] be DENIED and DISMISSED. This Court further DIRECTS the Clerk to enter judgment in favor of the respondent and to STRIKE this case from the active docket of this Court.

It is so ORDERED.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: April 21, 2020.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE